163 US 683

RECORD, CASE No. 13,678.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~17~~ 20 & 3

HENRY DENO, PLAINTIFF IN ERROR,

vs.

W. E. GRIFFIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA

FILED OCTOBER 1, 1889.

RECORD, CASE No. 13,678.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1892.

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1 *Petition for Writ of Error.*

In the Supreme Court of the State of Nevada.

HENRY DENO, Plaintiff and Appellant,
vs.
W. E. GRIFFIN, Defendant and Respondent.

To the Honorable Thomas P. Hawley, chief justice of the supreme court of the State of Nevada:

The plaintiff above named respectfully represents to your honor that he is the plaintiff in the above-entitled action; that said action was brought in the district court of the State of Nevada in and for the county of Lincoln; that said action is an action of trespass *quare clausum fregit* upon a mining claim situate in the county of Lincoln, State of Nevada; that the decision in said district court was adverse to said plaintiff, and said plaintiff appealed from such decision to the supreme court of the State of Nevada, which affirmed the said decision of said district court, and which said judgment was a final judgment upon the merits in the court of last resort in said State of Nevada.

That there was directly involved in said action a title to and the right to the possession of said mining ground under a statute
2 of the United States, and that said decision and judgment was adverse to such right, and that the construction of a statute of the United States is involved in the decision of said action or cause, all of which will more fully appear by the record of said action in this court.

The plaintiff and appellant herein, desiring to have the said judgment reviewed by the Supreme Court of the United States, respectfully petitions your honor to allow the said action and the record therein to be taken to the said Supreme Court of the United States upon a writ of error issued therefrom, and that your honor sign and issue a citation therein as required by law.

Wherefore appellant prays that he may be allowed to file said writ of error and that said citation issue.

GEO. S. SAWYER,
TRENMOR COFFIN,
C. H. PATCHEN,
Att'ys for Pl't'f and App'l't.

Carson City, Nevada, August 14th, A. D. 1889.

(Endorsed:) "Filed August 28, 1889. Chas. F. Bicknell, clerk supreme court, Nevada."

3 *Writ of Error.*

In the Supreme Court of the United States.

HENRY DENO, Plaintiff in Error,
vs.
W. E. GRIFFIN, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Nevada, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in said supreme court of the State of Nevada, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Henry Deno and W. E. Griffin, wherein a title, right, and privilege was claimed under a statute of the United States and the decision was against the title, right, and privilege specially set up and claimed under such statute, a manifest error hath happened, to the great damage of said Henry Deno, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with
4 all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 28th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of U. S. Circuit Court, Ninth Circuit, District of Nevada.]

T. J. EDWARDS,
Clerk U. S. Circuit Court, 9th Circuit & District of Nevada.

Allowed by—

THOMAS P. HAWLEY,
Chief Justice Supreme Court, State of Nevada.

(Endorsed:) "Filed August 28, 1889. Chas. F. Bicknell, clerk supreme court, Nevada."

5 *Citation.*

In the Supreme Court of the United States of America.

HENRY DENO, Plaintiff in Error,
vs.
W. E. GRIFFIN, Defendant in Error.

The United States of America to W. E. Griffin, the said defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Nevada, wherein Henry Deno is plaintiff in error and W. E. Griffin is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be reversed or corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas P. Hawley, chief justice of the supreme court of the State of Nevada, this 28th day of August, A. D. 1889.

THOMAS P. HAWLEY,
Chief Justice Supreme Court, State of Nevada.

6 We hereby acknowledge service of the within citation by copy this 5th day of September, 1889.

BAKER & WINES,
Attorneys for Defendants in Error.

(Endorsed:) "Filed August 28, 1889. Chas. F. Bicknell, clerk supreme court, Nevada."

Bond.

In Supreme Court of the United States.

HENRY DENO, Plaintiff in Error,
vs.
W. E. GRIFFIN, Defendant in Error.

Know all men by these presents that we, Henry Deno, as principal, and H. W. Turner and Henry Welland, as sureties, are held and firmly bound unto W. E. Griffin in the sum of eight hundred dollars, lawful money of the United States of America, to be paid to the said W. E. Griffin, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

7 Sealed with our seals and dated this 15th day of August, A. D. 1889.

Whereas the above-named Henry Deno hath prosecuted a writ

of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Nevada:

Now, therefore, the condition of this obligation is such that if the above-named Henry Deno shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY DENO. [SEAL.]
H. W. TURNER. [SEAL.]
HENRY WELLAND. [SEAL.]

UNITED STATES OF AMERICA, } ss:
State of Nevada, County of Lincoln, }

Henry W. Turner and Henry Welland, the sureties on the foregoing bond, being duly sworn, on oath says, each for himself and not one for the other, that he resides in the State of Nevada and is a freeholder therein, and that he is worth the sum specified in said bond as the penalty thereof in property situate in said State over and above all his debts and liabilities and exclusive of property exempt from execution.

H. W. TURNER.
HENRY WELLAND.

8 Subscribed and sworn to before me this 15th day of August, A. D. 1889.

[NOTARIAL SEAL.] T. J. OSBORNE,
Notary Public, Lincoln County, Nevada.

(Endorsed:) "The within bond is hereby approved this 28th day of August, A. D. 1889. Thomas P. Hawley, chief justice supreme court, State of Nevada. Filed August 28, 1889. Chas. F. Bicknell, clerk supreme court, Nevada."

9 *Transcript from Dist. Court, Lincoln County.*

In the Supreme Court of the State of Nevada.

In the District Court of the State of Nevada in and for the County of Lincoln.

HENRY DENO, Plaintiff,
v.
W. E. GRIFFIN, Defendant.

Complaint.

The said plaintiff complains of said defendant, and for cause of action alleges—

I.

That said plaintiff is and has been since, to wit, the 6th day of February, A. D. 1886, and continuously the owner of, in the posses-

sion of, and entitled to the possession of that certain piece and parcel of land, mine, mining ground, and mining claim situate, lying, and being in the Bristol mining district, in said county of Lincoln and State of Nevada, and described as follows, to wit:

The "Free Coinage" mine, mining ground, and mining claim, containing fifteen hundred linear feet, together with six hundred feet in width, as distinctly marked on the surface by stakes and monuments along the sides and ends of said claim, said stakes and monuments marking the boundary lines of the surface of said mining claim and ground; which said mining claim adjoins the "Ohio" mine and mining claim on the south end thereof, and also the northwest corner of the side line of the "Mayflower" mining claim, two well-known mines and mining claims.

II.

That heretofore, to wit, on the 28th day of December, A. D. 1886, the said defendant, without the leave or license of said plaintiff and with force and arms, broke and entered into the close of said plaintiff, as hereinbefore described—that is to say, the boundary lines of said "Free Coinage" mine and mining claim—and dug up and removed large quantities of valuable earth, rock, and quartz, containing gold, silver, and lead, of great value and to the damage of said plaintiff in a large sum, to wit, the sum of five hundred dollars.

Wherefore the said plaintiff brings this action and demands justice, and that he have judgment against said defendant for said sum of five hundred dollars and all costs and disbursements expended or incurred by him in this action.

GEO. S. SAWYER AND
C. H. PATCHEN,
Attorneys for Plaintiff.

STATE OF NEVADA, }
County of Lincoln, } ss:

Henry Deno, being duly sworn, on oath says that he is the plaintiff in the above-entitled action, and that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except such matters as are therein stated upon information and belief, and that as to those matters he believes it to be true.

HENRY DENO.

Subscribed and sworn to before me this 1st day of March, A. D 1887.

[SEAL.]

J. C. KELLEY,
County Clerk and Clerk of said Court.

Filed March 1st, 1887.

J. C. KELLEY, *Clerk.*

Summons.

In the District Court of the State of Nevada in and for the County of Lincoln.

HENRY DENO, Plaintiff,
vs.
W. E. GRIFFIN, Defendant.

Action brought in the district court of the State of Nevada in and for the county of Lincoln, and the complaint filed in said county of Lincoln, in the office of the clerk of said district court.

12 The State of Nevada sends greeting to W. E. Griffin, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the State of Nevada in and for the county of Lincoln and answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served in said county, or, if served out of said county, but within said district, within twenty days, and in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover a judgment against you for the sum of five hundred dollars, damage for trespass in breaking and entering the plaintiff's close, to wit, the "Free Coinage" mine and mining claim, situate in the Bristol mining district, in the county of Lincoln, State of Nevada, on, to wit, the 28th day of December, A. D. 1886, and digging up and removing large quantities of valuable rock and earth containing gold, silver, and lead without the leave or license of said plaintiff, as fully appears by the complaint in said action now on file in the office of the clerk of said court.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will apply to said — for the relief demanded in said complaint.

13 Given under my hand and the seal of the district court of the State of Nevada in and for the county of
[COURT SEAL.] Lincoln this 1st day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

J. C. KELLEY, *Clerk.*

(Endorsements.)

OFFICE OF THE SHERIFF OF THE COUNTY OF EUREKA, NEVADA.

I hereby certify that I received the within summons on the 7th day of March, A. D. 1887, and served the same on the 7th day of March, A. D. 1887, on W. E. Griffin, the defendant named therein, at Eureka, Eureka county, Nevada, by delivering to him a copy thereof,

attached to a certified copy of complaint in the action named in said summons.

Dated this 7th day of March, 1887.

W. H. SWEENEY, *Sheriff.*
G. T. RIVES,
Deputy Sheriff.

Filed on return March 14th, 1887.

J. C. KELLEY, *Clerk.*

GEO. S. SAWYER AND C. H. PATCHEN,
Attorneys for Plaintiff.

14 *Amended Answer.*

(Title of Court and Cause.)

Now comes W. E. Griffin, the defendant in the above-entitled action, and for answer to the complaint of the plaintiff therein denies that Henry Deno, the plaintiff in said action, is or has been since the 6th day of February, A. D. 1886, or any other time or at all or continuously the owner of, in the possession of, or entitled to the possession of that certain piece or parcel of land, mine, or mining ground or mining claim or any portion thereof situate, lying, or being in the Bristol mining district, Lincoln county, State of Nevada, and described as follows, to wit: The Free Coinage mine, mining ground, or mining claim, containing fifteen hundred lineal feet, together with six hundred feet in width as distinctly marked on the surface by stakes or monuments along the sides or ends of said alleged claim, which said alleged mining claim adjoins the Ohio mine on the south end thereof or adjoins the northwest corner of the side line of the Mayflower mining claim or any other or others.

Said defendant further denies that heretofore, on the 28th day of December, A. D. 1886, or at any other time the said defendant, without the leave or license of the plaintiff or otherwise or with force or arms or at all, broke or entered the close of said plaintiff or any close or the boundary lines of said Free Coinage mine or
15 mining claim, or dug up or removed any valuable or other rock, earth, or quartz containing gold, silver, or lead of great or any value, or in any manner damaged said plaintiff in the sum of five hundred dollars or in any amount or sum of money whatever.

For a further and separate answer and defense in this action the defendant alleges—

That for a long time prior to the 19th day of April, 1882, he and his predecessors in interest were the owners, in the possession, and entitled to the possession of that certain mine, mining claim, location, and lode located, known as, and called the "Great Eastern" mine or lode, the same being fifteen hundred feet in length and six hundred feet in width, situated in the Bristol mining district, in Lincoln county, State of Nevada.

Defendant further alleges that he and his predecessors in interest

remained continuously such owners in the possession and entitled to the possession of said "Great Eastern" mine or lode, and this defendant has continuously since the year 1880 remained the owner, in the possession, and entitled to the possession of said "Great Eastern" mine or lode and the whole thereof.

Defendant further alleges that since the commencement of this action and subsequent to the 4th day of April, A. D. 1887, this defendant became the owner of the title in fee to said "Great Eastern" mine or lode by patent from the Government of the United States, which said patent was issued to him upon application made
16 therefor.

Defendant further alleges that said "Great Eastern" mine or lode as aforesaid is identical with, includes, and embraces all that portion of the mining ground and premises described in the complaint herein, from which this defendant is alleged in said complaint to have dug up and removed large quantities of valuable rock, earth, and quartz, containing gold, silver, and lead, and is identical with, embraces, and includes the mining ground and premises into which defendant is alleged in said complaint to have broken and entered.

Wherefore, having fully answered, defendant asks judgment of dismissal of this action and for his costs herein.

BAKER & WINES,
HENRY RIVES AND
T. J. OSBORN,
Defendant's Attorneys.

STATE OF NEVADA, }
Eureka County, } *ss:*

W. E. Griffin, being first duly sworn, deposes and says that he is the defendant named in the foregoing answer; that he has read the same and knows the contents thereof, and the same and the statements therein contained are true of his own knowledge.

W. E. GRIFFIN.

Subscribed and sworn to before me this 3rd day of Oct., 1887.

17 [N. S.] JOHN McKERNAN,
Notary Public.

(Endorsements:) Amended answer. Filed Oct. 17th, 1887. J. C. Kelley, clerk.

Judgment.

(Title of Court and Cause.)

Judgment by the court the nineteenth day of October, 1887.

This cause came on regularly for *for* trial on the seventeenth day of October, A. D. 1887, Geo. S. Sawyer and C. H. Patchen, Esqs., appearing as counsel for plaintiff, and Baker & Wines and H. Rives, Esqs., for the defendant.

A trial by jury having been expressly waived by the respective parties, the cause was tried before the court sitting without a jury; whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court orders that judgment be entered herein in favor of the defendant in accordance with findings of fact and conclusions of law filed October 19th, 1887.

Wherefore, by reason of the law and premises aforesaid, it
18 is ordered, adjudged, and decreed that W. E. Griffin, the defendant, do have and recover of and from Henry Deno a judgment that said cause be, and the same is hereby, dismissed, and it is so ordered and adjudged. It is also ordered and adjudged that said W. E. Griffin do have and recover from Henry Deno, the plaintiff herein, his, said defendant's, costs and disbursements incurred in this action, amounting to the sum of twenty-three $\frac{15}{100}$ dollars.

Judgment recorded October 19th, A. D. 1887.

Attest: J. C. KELLEY, *Clerk.*

Statement on Appeal.

(Title of Court and Cause.)

Statement on Appeal from Judgment.

Assignment of errors and grounds upon which appellant intends to rely upon appeal.

I.

The court below erred in sustaining the objection of defendant to the question propounded to plaintiff while on the witness stand, testifying in his own behalf as to the work, labor, and improvements done, performed, or made upon the "Great Eastern" mining claim, under claim of title, to which defendant attempts to
19 justify the trespass alleged in plaintiff's complaint, during the year A. D. 1885, by said defendant or any one else.

II.

The court below erred in not permitting the plaintiff to prove, when he offered so to do, that defendant Griffin did not perform or cause to be performed any work or labor upon the said "Great Eastern" mine or mining claim or make or cause to be made any improvements thereon during the year A. D. 1885, and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year 1884, and that no work or labor was done or performed for or by him, said defendant, upon or around said mine or mining claim from December 26th, A. D. 1884, until December 28th, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

III.

The court below erred in rendering, making, and entering the judgment from which this appeal is taken.

Evidence to Explain Assignment of Errors.

The said above-entitled action coming on regularly for trial on the 18th day of October, A. D. 1887, before said court in regular session a jury was expressly waived by the respective parties, and it was agreed by them in open court that said action should be tried by the court sitting without a jury; whereupon the plaintiff was called and sworn as a witness in his own behalf.

After a few preliminary questions the attorneys for the respective parties concluded that certain facts involved in the trial of the case could be agreed upon without proof. The court, at their suggestion, took a recess to allow them to consult and formulate such facts as could be agreed upon by them. When the court reconvened they presented the following statement of such facts as had been agreed upon by them:

Statement of Facts.

(Title of Court and Cause.)

It is hereby stipulated and agreed that the following are facts in the above-entitled cause:

That upon the 4th day of October, A. D. 1877, A. Rickard, a citizen of the United States, located and took up the Great Eastern mine, situated in the Bristol mining district, in Lincoln county, Nevada, by then and there posting a notice upon the same, under which said notice he claimed 1,500 feet in length and six hundred feet in width as the extent of said mining claim, and at the same time sufficiently marked the boundaries thereof on the surface, so that the same could be easily seen and readily traced; that W. E. Griffin has succeeded to all of the interests of said locator, Ricard, and is now the owner and holder of the same.

21 That upon the 19th day of April, A. D. 1882, said defendant Griffin duly applied to the United States for a patent for and to said Great Eastern mine and lode.

That upon the 23d day of June, A. D. 1882, and in due time and form said plaintiff in this case, Henry Deno, and the Bristol Silver Mining Company protested against the issuance of said patent and filed an adverse claim in the United States land office, and upon the 20th day of July, A. D. 1882, said Deno and said Bristol Silver Mining Company commenced the required action to determine the right of possession and the title as between themselves and said Griffin to and for a large portion of said "Great Eastern mine" or mining claim.

That said action upon said protest and adverse claim was pending and undetermined until the 4th day of April, A. D. 1887, on which date said action was finally determined by the supreme court of the

State of Nevada by the dismissal of the same in the said supreme court.

That upon the 26th day of December, A. D. 1884, said Griffin paid to the Government of the United States, through the receiver of the United States land office at Eureka, Nevada, the price required by law for said Great Eastern mine and for every part thereof, and said receiver then and there issued to said Griffin an official receipt for such payment, such receipt being in the form usual and as required in such cases.

22 That upon the 6th day of February, A. D. 1886, said Henry Deno placed a notice of location, good in form and substance, upon the "Free Coinage" mine, and then and there located the same in proper form, and at the same time appropriately and sufficiently marked the boundaries of said "Free Coinage" mine, so that the same could be readily seen and readily traced.

That the point where said notice of location of the said Free Coinage mine was placed and the initial point thereof was within the boundaries of said "Great Eastern" mine as the same were established by the locator thereof.

That said "Free Coinage" mine embraces and includes the larger portion of the "Great Eastern mine" and the shaft and excavations theretofore made on said "Great Eastern" mine by said defendant and his predecessors.

That on or about the 26th day of December, A. D. 1886, the defendant Griffin, without the leave or license of the plaintiff Deno, entered into and upon the said "Free Coinage" mine, and, for the purpose of doing ordinary developing work on said "Great Eastern mine," did, within that portion of the "Free Coinage" mine which embraced a portion of said Great Eastern mine, dig up, blast out, and remove from their natural places some quantities of earth, ore, rocks, and quartz, but did not nor has he ever removed any portion of said ore, rock, or quartz away from or beyond the boundaries of said Free Coinage mine, and the whole of said earth, ore, rock, and quartz now remains and ever has remained upon and within the boundaries of said "Free Coinage mine."

23 That upon the first day of March, A. D. 1887, said Deno commenced this action; that upon the seventh day of September, A. D. 1887, the Government of the United States issued to the defendant, Griffin, its mineral patent for said "Great Eastern" mine and every part thereof.

That said patent is in due and legal form and duly executed and attested, the survey thereof being known as U. S. survey No. 47.

That upon the 26th day of April, A. D. 1887, the Commissioner of the General Land Office of the United States made the following order, directed to the register of the land office at Eureka, Nevada, viz: "In the matter of mineral entry No. 698, for the Great Eastern lode, made December 26th, 1884, by W. E. Griffin, I am in receipt of a letter under date of the 9th inst. (April, 1887) from Messrs. Britton & Gray, attorneys of this city, of counsel for Henry Deno (upon whose adverse claim against claimant for said Great Eastern lode suit was duly instituted), filing certain additional evidence as

to the present pending of said suit upon appeal to the supreme court of the State of Nevada.

"In view thereof counsel state: 'From these proofs it is apparent that the appeal is still pending and the allowance of entry before the disposal thereof was erroneous; hence it should follow that this entry, being improperly allowed, must be cancelled and the case held in abeyance to await the conclusion of proceedings in court. We so ask.'

24 "Granting the premises laid down by counsel, it does not follow as of necessity that the entry in question should be cancelled, but the interests of all parties concerned will be fully subserved by suspension of further action upon said entry until the decision of the supreme court of Nevada shall have been rendered.

"The motion for cancellation is therefore denied, but mineral entry No. 698 will remain suspended awaiting the determination of the questions at issue in the suit now pending."

That upon the 18th day of July, 1887, the clerk of the supreme court of the State of Nevada duly issued a certificate stating that upon the 4th day of April, 1887, said action of Henry Deno and the Bristol Silver Mining Company was dismissed in said court, and that there was not on said date any action or proceeding pending in said court between Henry Deno and the Bristol Silver Mining Company or either of them against W. E. Griffin.

That said certificate was forwarded to the officers of the United States land office at Eureka, Nevada, and to the Commissioner of the General Land Office at Washington city, more than two months prior to the issuance of the patent to said Griffin for said Great Eastern lode.

That at the time of the issuance of said patent there was no suit pending between the plaintiff and the defendant based upon any protest or adverse claim filed in the U. S. land office and

25 no suit of any character pending between them except this action commenced on the first day of March, A. D. 1887.

(Sg.) HENRY RIVES,
BAKER & WINES, AND
T. J. OSBORNE,
Att'ys for Defendant.

GEO. S. SAWYER AND
C. H. PATCHEN,
Att'ys for Plaintiff.

(Endorsed:) District court, State of Nevada, Lincoln county. Henry Deno *versus* W. E. Griffin. Agreed statement of facts. Filed Oct. 18th, 1887. J. C. Kelley, clerk.

The plaintiff, being still upon the witness stand as a witness in his own behalf, was asked the following question by his attorneys:

Question. State whether or not there was any work or labor done or performed or any improvements or expenditures made upon, in, or around the "Great Eastern" mine or mining claim by the defendant or any one else during the year A. D. 1885.

Objected to by the attorneys for the defendant upon the ground that it was irrelevant, immaterial, and incompetent under the admitted facts in this case.

26 The objection was sustained by the court; to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

The plaintiff, by his attorneys, then offered to prove that defendant Griffin did not perform or cause to be performed any work or labor upon the said "Great Eastern" mine or mining claim or make or cause to be made any improvements thereon during the year A. D. 1885, and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year A. D. 1884, and that no work or labor was done or performed for or by him, said defendant, upon, in, or around said mine or mining claim from December 26th, 1884, until December 28th, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

The attorneys for the defendant objected to the evidence so offered upon the ground that it was irrelevant, immaterial, and incompetent under the admitted facts in this case.

The court sustained the objection; to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

The attorneys for the defendant here admitted, for the purpose of the trial of this case, that from the 6th day of February, A. D. 1886, to and including the 28th day of December, A. D. 1886, the said plaintiff was in such constructive possession of the "Free Coinage" mine and mining claim described in his complaint

27 as he acquired by means or virtue of his location thereof.

The above and foregoing is all the evidence and testimony submitted or offered upon the trial of the above-entitled cause by either the plaintiff or defendant.

GEO. S. SAWYER AND
C. H. PATCHEN,
Att'ys for Plaintiff and Appellant.

(Endorsements.)

Filed Nov. 7, 1887.

J. C. KELLEY, *Clerk.*

Due service of a copy of the within statement on appeal—after filing—on the 7th day of November, A. D. 1887, is hereby admitted.

HENRY RIVES,
BAKER & WINES, AND
T. J. OSBORNE,
Att'ys for Def't and Resp't.

We do hereby certify that the within and foregoing statement on appeal has been agreed to by us and is correct.

GEO. S. SAWYER AND
C. H. PATCHEN,
Attorneys for Plaintiff and Appellant.
HENRY RIVES,
BAKER & WINES, AND
T. J. OSBORNE,
Att'ys for Def't and Respondent.

28 *Notice of Appeal.*

(Title of Court and Cause.)

You will please take notice that said plaintiff in said above-entitled action hereby appeals to the supreme court of said State of Nevada from the judgment of said district court made and entered on the 19th day of October, A. D. 1887, in said above-entitled action, in favor of said defendant and against said plaintiff, and from the whole thereof.

Yours, etc.,

GEO. S. SAWYER AND
C. H. PATCHEN,
Attorneys for said Pl'ff and App'l'nt.

To the clerk of said district court and to Henry Rives, Baker & Wines, and T. J. Osborne, attorneys for said def't and resp't.

(Endorsements.)

Filed Nov. 26, 1887.

J. C. KELLEY, *Clerk.*

Due service of the within notice of appeal by receipt of a copy thereof after the original had been filed in the clerk's office of said court and on the 26th day of November, A. D. 1887, is hereby admitted.

HENRY RIVES,
BAKER & WINES, AND
T. J. OSBORNE,
Att'ys for said Def't and Respondent.

29 *Undertaking on Appeal.*

(Title of Court and Cause.)

Whereas the plaintiff in the above-entitled action has appealed to the supreme court of the State of Nevada from a judgment made and entered against him in said action in the said district court in favor of the defendant in said action on the 19th day of October, A. D. 1887, dismissing said action and for the sum of twenty-three $\frac{150}{100}$ dollars, costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and freeholders of the said county

of Lincoln, do hereby jointly and severally undertake and promise on the part of appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars, in which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of forty-six $\frac{30}{100}$ dollars, being double the amount named in the said judgment, that if the said judgment appealed from or any part thereof be affirmed or the appeal be dismissed the appellant will pay to said defendant the amount directed to be paid by the judgment or order or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal.

Dated this 26th day of November, A. D. 1887.

JOHN O. GELABERT. [SEAL.]
DAN. ROEDER. [SEAL.]

STATE OF NEVADA, }
County of Lincoln, } ss:

John O. Gelabert and Daniel Roeder, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of Nevada and said county of Lincoln.

JOHN O. GELABERT.
DAN. ROEDER.

Subscribed and sworn to before me this twenty-sixth day of November, A. D. 1887.

J. C. KELLEY, *Clerk.*

Filed November 26th, 1887.

J. C. KELLEY, *Clerk.*

Clerk's Certificate.

I, J. C. Kelley, county clerk and *ex officio* clerk of the district court of the State of Nevada in and for the county of Lincoln, do hereby certify the foregoing twenty-four pages to contain a full, true, and correct transcript of all papers and records called for on appeal in the case of Henry Deno *v.* W. E. Griffin, to wit, the complaint, summons, amended answer, judgment, statement on appeal, notice of appeal, and undertaking on appeal, as the same remain on file and of record in my office.

Seal of District Court.

Witness my hand and the seal of said district court this — day of March, one thousand eight hundred and eighty-eight.

J. C. KELLY,
Clerk of the District Court of the State of Nevada in and for the County of Lincoln.

Endorsements.

(Endorsed on cover:) "No. 1284. In the supreme court of the State of Nevada. Henry Deno, appellant, *vs.* W. E. Griffin, respondent. Transcript on appeal from the district court of the State of Nevada in and for the county of Lincoln. Trenmor Coffin, Geo. S. Sawyer, and C. H. Patchen, attorneys for appellant. Henry Rives, Baker & Wines, and T. J. Osborne, attorneys for respondent. Filed April 2, 1888. Chas. F. Bicknell, clerk S. C., Nev."

32 *Minutes of Court.*

In the Supreme Court of the State of Nevada.

CARSON, *April* 2, 1888.

Court met at 10 o'c'k a. m.
Full bench and officers of the court present.

* * * * * * *

HENRY DENO, Appellant,
v.
W. E. GRIFFIN, Respondent.

In the above cause it is ordered that the same be submitted on briefs as follows:
Appellant allowed 10 days to file brief;
Respondent allowed 20 " " " and
Appellant allowed 10 " to reply.

* * * * * * *

Attest: CHAS. F. BICKNELL, *Clerk.*

Opinion of Court.

HENRY DENO, Appellant,
vs.
W. E. GRIFFIN, Respondent.
No. 1284.

By MURPHY, *J.:*

33 This is an action of trespass *quare clausum fregit* upon a mining claim, particularly described in the complaint, situated in the Bristol mining district, Lincoln county, Nevada.

The defendant in his amended answer denies the ownership and right of possession of the plaintiff and avers that he is the owner of the title in fee to the Great Eastern mine by patent from the Gov-

ernment of the United States. The cause was tried before the court without a jury.

It appears from the statement of facts that on the fourth day of October, A. D. 1877, A. Rickard, a citizen of the United States, located the Great Eastern mine, containing 1,500 feet in length by 600 feet in width, and sufficiently marked the boundaries thereof. The respondent, Griffin, succeeded to all of the rights and interest of the said locator, Rickard, and is now the owner and holder of the same. In the month of April, A. D. 1882, respondent Griffin applied to the United States for a patent for and to said Great Eastern mine and lode. In the month of June, A. D. 1882, in due time and form appellant, Henry Deno, and the Bristol Silver Mining Company protested against the issuance of a patent and filed an adverse claim in the United States land office and in due time commenced the required action to determine the right of possession to the Great Eastern mine; that said action was pending and undetermined until the fourth day of April, A. D. 1887, and on said last-mentioned date said action was dismissed by the supreme court of this
34 State; that on the 26th day of December, 1884, respondent paid to the Government of the United States, through the receiver of public money at the United States land office at Eureka, Nevada, the price of said land embraced in the Great Eastern application and received the receiver's receipt therefor.

On the sixth day of February, A. D. 1886, the appellant located the Free Coinage mine, which location embraces and includes the larger portion of the Great Eastern mine or lode; that on the 26th day of December, A. D. 1886, the respondent entered upon the Free Coinage mine or that portion of it which embraces the Great Eastern ground for the purpose of working the same. Appellant commenced this action on the first day of March, A. D. 1887. On the seventh day of September, A. D. 1887, the Government of the United States issued to respondent a patent for said Great Eastern mine.

Appellant claims that by reason of the action of the receiver in receiving the money from the respondent and issuing his receipt therefor during the pendency of the former action the patent issued thereon is void; such would have been the case had the appellant prosecuted his former suit to final judgment, provided the judgment had been in his favor. He having failed to do so, and that action having been dismissed, he is not now in a position to complain of the action of the Government officials in the issuance of the patent. Givillen *v.* Donnellan, 115 U. S., 48; Deffeback *v.* Hawk, 115
35 U. S., 392; Stark *v.* Starrs, 6 Wall., 418; Smelting Co. *v.* Kemp, 104 U. S., 636; Paterson *v.* Tatum, 3 Sawyer, 172.

Under the act of Congress of 1872, when a party applying for a patent to mining ground gives the proper notice as therein required, any other claimant can object to the issuance of the patent, either on account of its extent or form or because of asserted prior location. They must come forward with their objections and present them or they will be precluded from objecting to the issuing of the patent. Therefore the doctrine of relation applies to patents to mining claims, so as to cut off intervening claimants, if any there should

be, such as might arise from a subsequent location. Heydenfeldt *v.* Daney, 93 U. S., 640; The Eureka Cases, 4 Sawyer, 303; Deffeback *v.* Hawk, 115 U. S., 392; Courchaine *v.* The Bullion M. Co., 4 Nev., 374.

On the trial of the cause in the district court plaintiff, by his attorneys, offered to prove that the defendant Griffin did not perform or cause to be performed any work or labor upon said Great Eastern mine or make any improvements thereon from December the 26th, A. D. 1884, until the 28th day of December, A. D. 1886. Defendant, by his attorneys, objected to the evidence so offered upon the ground that it was irrelevant, immaterial, and incompetent under the admitted facts in the case. The court sustained the objection and the plaintiff, by his attorneys, excepted.

Did the court err in ruling out the proffered evidence?

36 Title to mining claims may be acquired by possession and by purchase. Title by possession, being a mere right of enjoyment of the profits without purchase and upon conditions, may be defeated at any time by the failure of the party in possession to comply with the conditions, which are marking the boundaries of his claim and performing the labor or making the improvements as required by the statute. The equitable title accrues immediately upon payment of purchase-money to the Government, for the entry entitles the purchaser to a patent, and the right to a patent, once vested, is equivalent to a patent issued. Stark *v.* Starrs, 6 Wall., 418.

When proofs are completed and purchase-money paid the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts and relates back to the date of entry, to the exclusion of all intervening claimants. Deffeback *v.* Hawk, 115 U. S., 405; Courchaine *v.* Bullion M. Co., 4 Nev., 374. Upon the payment of the purchase-money and the issuance of the patent certificate by the authorized agent of the Government the purchaser is not required to do annual assessment work. Aurora Hill *et al. vs.* Tangerman *et al.*, 12 Sawyer, 355; Alta Mining and Smelting Co. *v.* Benson Mining and Smelting Co., 16 Pac. Rep., 565.

It follows from the views we have expressed that the court

37 did not err in refusing to hear the offered evidence.

Judgment affirmed.

MURPHY, *J.*

We concur.

HAWLEY, *C. J.*
BELKNAP, *J.*

(Endorsed:) Filed February 8, 1889. Chas. F. Bicknell, clerk.

Judgment.

HENRY DENO, Appellant,
vs.
W. E. GRIFFIN, Respondent.
} Appeal from the District Court, Lincoln County, Nevada. No. 1284.

The above-entitled cause, having been, at a former day, submitted on briefs filed by counsel for the respective parties, was taken under advisement by the court.

And now, on this day, all and singular the law and the premises having been seen, heard, and fully considered, the opinion of the court is delivered by Murphy, J.—Hawley, C. J., and Belknap, J., concurring—to the effect that the judgment of the lower court is affirmed.

Whereupon it is now ordered, adjudged, and decreed by the court that the judgment of the district court in and for Lincoln county in the above-entitled cause be, and the same is hereby, affirmed, with costs.

Judgment rendered February 8, 1889.

38 *Assignment of Errors.*

In Supreme Court of the United States.

HENRY DENO, Plaintiff in Error,
vs.
W. E. GRIFFIN, Defendant in Error.

The said plaintiff in error submits the following assignments of error as having occurred in the making, rendering, and entering of the judgment in said above-entitled action, viz.:

I.

The supreme court of the State of Nevada erred in not sustaining the assignment of errors made by the appellant in said court, *i. e.*:

First. The court below erred in sustaining the objection of the defendant to the questions propounded to plaintiff, while on the witness stand testifying in his own behalf, as to the work, labor, and improvements done, performed, or made upon the "Great Eastern" mining claim under claim of title to which defendant attempts to justify the trespass alleged in plaintiff's complaint during the year A. D. 1885 by said defendant or any one else.

39 Second. The court below erred in not permitting the plaintiff to prove, when he offerred so to do, that defendant Griffin did not perform or cause to be performed any work or labor upon the said "Great Eastern" mine or mining claim or made or cause to be made any improvements during the year A. D. 1885; and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture

thereof under the laws of the United States during the year A. D. 1884; and that no work or labor was done or performed for or by him, said defendant, upon or around said mine or mining claim from December 26th, A. D. 1884, until December 28th, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

Third. The court below erred in making, rendering, and entering the judgment from which this appeal is taken.

II.

That said supreme court of said State of Nevada erred in assuming and basing its decision and judgment in this case upon such assumption that there was no difference in law between the rights of a locator under a location existing at the time of application for patent or made prior to the expiration of the time allowed for protesting and adversing such application and one made long subsequent to that time upon a failure by the contesting parties or either of them to perform the necessary work or make the necessary expenditure upon their respective claims to protect their rights to their respective possessions thereof.

III.

That said supreme court of said State of Nevada erred in assuming as a matter of law that the land office or department had jurisdiction to receive the money for the Great Eastern mining claim from the defendant in error, or any jurisdiction except as the statute provides, after the commencement of the suit in which "Henry Deno and the Bristol Silver Mining Company" were plaintiffs and "Henry Deno" (W. E. Griffin) was defendant, and in not deciding that the pretended entry by defendant was absolutely void.

IV.

That said supreme court of the State of Nevada erred in not deciding that the patent put in evidence by the defendant in error was absolutely void.

V.

That said supreme court of the State of Nevada erred in not deciding that the location of the plaintiff in error gave him a grant from the Government to the possession of the "Free Coinage" mining claim so long as he performed the necessary annual work thereon.

VI.

That said supreme court of Nevada erred in assuming that "Henry Deno and the Bristol Silver Mining Company" was the same legal entity as "Henry Deno."

Wherefore, upon the foregoing assignment of errors, the said plaintiff in error prays that said judgment of said supreme

court of the State of Nevada in said above-entitled action or cause may be reversed.

GEO. S. SAWYER,
TRENMOR COFFIN AND
H. F. BARTINE,
Attorneys for Plaintiff in Error.

(Endorsed:) "Filed August 28, 1889. Chas. F. Bicknell, clerk supreme court, Nevada."

42 *Clerk's Certificate.*

In Supreme Court of the State of Nevada.

HENRY DENO, Appellant,
vs.
W. E. GRIFFIN, Respondent.

I, Chas. F. Bicknell, clerk of the supreme court of the State of Nevada, do hereby certify that the foregoing forty-one pages contains a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause; that the original writ of error and citation, with acknowledgment of service endorsed thereon, are appended to the return herein, and that they are all returned, with a copy of the bond, to the Supreme Court of the United States, in obedience to the command of the writ of error hereto annexed.

Seal Supreme Court, State of Nevada.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at Carson City, Nevada, this 16th day of September, A. D. 1889.

CHAS. F. BICKNELL,
Clerk Supreme Court, Nevada.

Endorsed on cover: Case No. 13,678. Nevada supreme court. No. 117. Henry Deno, plaintiff in error, *vs.* W. E. Griffin. Filed October 1, 1889.

Supreme Court U. S.
FILED.
AUG 26 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

HENRY DENO, PLAINTIFF IN ERROR,

v.

W. E. GRIFFIN, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Nevada.

BRIEF FOR PLAINTIFF IN ERROR.

GEO. S. SAWYER,
THURMAN COFFIN,
C. H. PATCHIN,
H. F. BARTINE,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

In the Supreme Court of the United States.

HENRY DENO, PLAINTIFF IN ERROR,

v.

W. E. GRIFFIN, DEFENDANT IN ERROR.

In error to the Supreme Court of the State of Nevada.

Brief for Plaintiff in Error.

STATEMENT.

This is an action of trespass *quare clausum fregit*, brought by the plaintiff in error against the defendant in error for an alleged trespass upon the plaintiff's mining claim, called the "Free Coinage" mining claim, and located by said plaintiff upon the public mineral domain of the United States, in the Bristol mining district, in the county of Lincoln and State of Nevada.

The action was commenced on the 1st day of March, A. D. 1887, in the district court of the State of Nevada in and for the county of Lincoln.

Summons was duly served, and the defendant appeared and answered; and subsequently, by leave of court, filed an amendatory and supplemental answer, in which he sought to justify the alleged trespass by a claim of title to the *locus in quo* by virtue of a United States mineral patent issued subsequently to the commencement of the action and to the filing of the original answer.

The action was tried by the court sitting without a jury, and a partial statement of facts was agreed to by the attorneys for the respective parties as follows:

Statement of facts.

(Title of Court and Cause.)

It is hereby stipulated and agreed that the following are facts in the above-entitled cause:

That upon the fourth day of October, A. D. 1877, A. Rickard, a citizen of the United States, located and took up the Great Eastern mine, situated in the Bristol mining district, in Lincoln county, Nevada, by there and then posting a notice upon the same, under which said notice he claimed 1,500 feet in length and 600 feet in width as the extent of said mining claim, and at the same time sufficiently marked the boundaries thereof on the surface, so that the same could be easily seen and readily traced.

That W. E. Griffin has succeeded to all of the interests of said locator, Rickard, and is now the owner and holder of the same.

That upon the 19th day of April, A. D. 1882, said defendant, Griffin, duly applied to the United States for a patent for and to said Great Eastern mine and lode.

That upon the 23d day of June, A. D. 1882, and in due time and form, said plaintiff in this case, Henry Deno,

and the Bristol Silver Mining Company protested against the issuance of said patent and filed an adverse claim in the United States Land Office, and upon the twentieth day of July, A. D. 1882, said Deno and the said Bristol Silver Mining Company commenced the required action to determine the right of possession and the title as between themselves and said Griffin to and for a large portion of said Great Eastern mine or mining claim.

That said action upon said protest and adverse claim was pending and undetermined until the fourth day of April, A. D. 1887, on which date said action was finally determined by the supreme court of the State of Nevada by the dismissal of the same in the said supreme court.

That upon the twenty-sixth day of December, A. D. 1884, said Griffin paid to the Government of the United States, through the receiver of the United States land office at Eureka, Nevada, the price required by law for said Great Eastern mine, and for every part thereof; and said receiver then and there issued to said Griffin an official receipt for such payment, such receipt being in the form usual and as required in such cases.

That upon the sixth day of February, A. D. 1886, said Henry Deno placed a notice of location, good in form and substance, upon the "Free Coinage" mine, and then and there located the same in proper form, and at the same time appropriately and sufficiently marked the boundaries of said "Free Coinage" mine, so that the same could be easily seen and readily traced.

That the point where said notice of location of the said "Free Coinage" mine was placed, and the initial point thereof, was within the boundaries of said "Great Eastern" mine, as the same was established by the location thereof.

That said "Free Coinage" mine embraces and includes the larger portion of the "Great Eastern" mine and the

shaft and the excavations theretofore made on said "Great Eastern" mine by said defendant and his predecessors.

That on or about the twenty-sixth day of December, A. D. 1886, the defendant, Griffin, without the leave or license of the plaintiff, Deno, entered into and upon the said "Free Coinage" mine, and for the purpose of doing ordinary developing work on said "Great Eastern" mine, did, within that portion of the "Free Coinage" mine which embraced a portion of said "Great Eastern" mine, dig up, blast out, and remove from their natural places some quantities of earth, ore, rock, and quartz, but did not, nor has he ever, removed any portion of said ore, rock, or quartz away from or beyond the boundaries of said "Free Coinage" mine, and the whole of said ore, earth, rock, and quartz now remains and ever has remained upon and within the boundaries of said "Free Coinage" mine.

That upon the first day of March, A. D. 1887, said Deno commenced this action.

That upon the seventh day of September, A. D. 1887, the Government of the United States issued to the defendant, Griffin, its mineral patent for said Great Eastern mine and every part thereof.

That said patent is in due and legal form and duly executed and attested, the survey thereof being known as "U. S. survey No. 47."

That upon the 26th day of April, A. D. 1887, the Commissioner of the General Land Office of the United States made the following order, directed to the register of the land office at Eureka, Nevada, viz:

"In the matter of mineral entry No 698, for the Great Eastern lode, made December 26, 1884, by W. E. Griffin, I am in receipt of a letter under date of the ninth

inst. (April, 1887) from Messrs. Britton and Gray, attorneys, of this city, of counsel for Henry Deno (upon whose adverse claim against claimant for said Great Eastern lode suit was duly instituted), filing certain additional evidence as to the present pending of said suit now upon appeal to the supreme court of the State of Nevada."

"In view thereof counsel state:

"'From these proofs it is apparent that the appeal is still pending, and the allowance of entry before the disposal thereof was erroneous; hence it should follow that this entry, being improperly allowed, must be cancelled and the case held in abeyance to await the conclusion of proceedings in court. We so ask.'

"Granting the principle laid down by counsel, it does not follow as of necessity that the entry in question should be cancelled, but the interests of all parties concerned will be fully subserved by suspension of further action upon said entry until the decision of the supreme court of Nevada shall have been rendered.

"The motion for cancellation is therefore denied, but mineral entry No. 698 will remain suspended awaiting the determination of the questions at issue in the suit now pending."

That upon the eighteenth day of July, 1887, the clerk of the supreme court of the State of Nevada duly issued a certificate stating that upon the fourth day of April, 1887, said action of Henry Deno and the Bristol Silver Mining Company was dismissed in said court, and that there was not on said date any action or proceeding pending in said court between Henry Deno and the Bristol Silver Mining Company, or either of them, against W. E. Griffin.

That said certificate was forwarded to the officers of the United States land office at Eureka, Nevada, and to the Commissioner of the General Land Office at Washington city more than two months prior to the issuance of the patent to said Griffin for said Great Eastern lode.

That at the time of the issuance of said patent there was no suit pending between the plaintiff and the defendant based upon any protest or adverse claim filed in the U. S. Land Office, and no suit of any character pending between them, except this action, commenced on the first day of March, A. D. 1887.

(Signed) HENRY RIVES,
BAKER AND WINES, AND
T. J. OSBORNE,
Attorneys for the Defendant.

GEO. S. SAWYER and
C. H. PATCHEN,
Attorneys for Plaintiff.

Record, pp. 10–12, folios 20–25.

The plaintiff, having been sworn as a witness in his own behalf, was then asked by his attorneys the following:

"Question. State whether or not there was any work or labor done or performed or any improvements or expenditures made upon, in, or around the 'Great Eastern' mine or mining claim by the defendant or any one else during the year A. D. 1885."

Objected to by the attorneys for the defendant upon the ground that it was irrelevant, immaterial, and incompetent under the admitted facts in this case.

The objection was sustained by the court.

To which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

Record, pp. 12–13, folios 25 26.

The plaintiff, by his attorneys, then offered to prove that defendant did not perform or cause to be performed any work or labor upon the said Great Eastern mine or min-

ing claim or make or cause to be made any improvements thereon during the year A. D. 1885, and that not sufficient work or expenditures was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year A. D. 1884; and that no work or labor was done or performed for or by him, said defendant, upon, in, or around said mine or mining claim from December 26, A. D. 1884, until December 28, A. D. 1886, which latter was the act constituting the trespass complained of by the plaintiff.

The attorneys for the defendant objected to the evidence so offered upon the ground that it was irrelevant, immaterial, and incompetent under the admitted facts in this case.

The court sustained the objection.

To which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

Record, p. 13, folio 26.

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The attorneys for the defendant then admitted, for the purpose of the trial of this case, that from the 6th day of February, A. D. 1886, to and including the 28th day of December, A. D. 1886, the said plaintiff was in such constructive possession of the "Free Coinage" mine and mining claim described in his complaint as he acquired by means or virtue of his location thereof.

Record, p. 13, folio 26–27.

The case was then submitted and the court rendered a judgment in favor of said defendant.

An appeal therefrom to the supreme court of the State of Nevada was duly taken by said plaintiff upon the following assignments of error:

I.

The court below erred in sustaining the objection of the defendant to the question propounded to plaintiff, while on the witness stand testifying in his own behalf, as to the work, labor, and improvements, done, performed or made upon the Great Eastern mining claim, under claim of title to which defendant attempts to justify the trespass alleged in plaintiff's complaint, during the year 1885, by said defendant or any one else.

II.

The court below erred in not permitting the plaintiff to prove, when he offered so to do, that defendant, Griffin, did not perform or cause to be performed any work or labor upon the said Great Eastern mine or mining claim, or make or cause to be made any improvements thereon, during the year A. D. 1885; and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year A. D. 1884; and that no work or labor was done or performed for or by him, said defendant, upon or around said mine or mining claim from December 26, A. D. 1884, until December 28, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

III.

The court below erred in rendering, making, and entering the judgment from which this appeal is taken.

Record, pp. 19–20, folios 38–39.

The supreme court of the State of Nevada affirmed the judgment of the court below, to reverse which judgment this writ of error is sued out.

Assignment of Error.

I.

The supreme court of the State of Nevada erred in not sustaining the assignment of errors made by the appellant in said court, *i. e.:*

"*First.* The court below erred in sustaining the objection of the defendant to the question propounded to plaintiff, while on the witness stand to testify in his own behalf, as to the work, labor, and improvements done, performed or made upon the 'Great Eastern' mining claim, under claim of title to which the defendant attempts to justify the trespass alleged in plaintiff's complaint, during the year A. D. 1885, by said defendant or any one else.

"*Second.* The court below erred in not permitting the plaintiff to prove, when he offered so to do, that defendant, Griffin, did not perform or cause to be performed any work or labor upon the said 'Great Eastern' mine or mining claim, or make or cause to be made any improvements thereon, during the year A. D. 1885; and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year A. D. 1884; and that no work or labor was done or performed for or by him, said defendant, upon or around said mine or mining claim from December 26, A. D. 1884, until December 28, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

"*Third.* The court below erred in making, rendering, and entering the judgment from which this appeal is taken."

II.

The said supreme court of said State of Nevada erred in assuming and basing its decision and judgment in this case upon such assumption, that there was no difference in law between the rights of a locator, under a location existing at the time of application for a patent or made prior to the expiration of the time allowed for protesting and adversing such application, and one made long subsequent to that time upon a failure by the contesting parties or either of them to perform the necessary work or make the necessary expenditure upon their respective claims to protect their rights to their respective possessions thereof.

III.

The said supreme court of the State of Nevada erred in assuming, as a matter of law, that the Land Office or Department had *jurisdiction* to receive the money for the Great Eastern mining claim from the defendant in error, or any jurisdiction except as the statute provides, after the commencement of the suit in which "Henry Deno and the Bristol Silver Mining Company" were plaintiffs and "W. E. Griffin" was defendant was absolutely void.

IV.

The said supreme court of the State of Nevada erred in not deciding that the patent put in evidence by the defendant in error was absolutely void.

V.

The said supreme court of the State of Nevada erred in not deciding that the location of the plaintiff in

error gave him a grant from the Government of a right to the possession of the "Free Coinage" mining claim so long as he performed the necessary annual work thereon.

VI.

The said supreme court of Nevada erred in assuming that "Henry Deno and the Bristol Silver Mining Company" was the same legal entity as "Henry Deno."

ARGUMENT.

The material question presented for decision is:

Was the mining ground embraced in the "Free Coinage" mining claim locatable under the laws of the United States, at the time it was located by the plaintiff in error, on the 6th day of February, A. D. 1886?

The incidental questions leading up to the main question are:

First. Can the foregoing material question be examined and decided in this case?

Second. When an application for a patent to mineral ground is made, and the same is regularly and legally protested againt, and an adverse claim filed and suit regularly brought thereon, has the Department of the Interior any right or *jurisdiction* to allow the claimant to make entry and payment for the ground embraced in his said application, and is not such an attempted entry and payment void?

Third. If such an attempted entry is suspended by the Department, does it give any rights or immunities during such suspension?

Fourth. Must the annual work and expenditure required by the laws of the United States to prevent the

forfeiture of a mining claim be done and made annually "until a patent has been issued therefor?"

Fifth. If, after an application for a patent to a mining claim, the applicant fails to perform the required work or make the required annual expenditure upon the claim and it is legally and properly located by another party, after such failure and before the resumption of work by said applicant or his heirs, assigns, or legal representatives upon or around such claim, is not a patent subsequently issued to such applicant void as to the right of possession of such locator?

I.

Can the question as to whether the mining ground embraced in the "Free Coinage" mining claim was at the time of the location thereof by the plaintiff in error PUBLICI JURIS *and open to location under the mining laws of the United States be examined and decided in this action?*

We contend that it can. This is an action of trespass, *quare clausum fregit*, in which the plaintiff is seeking to defend his possession of certain mining ground, the right to the possession of which was guaranteed to him by the Government of the United States by virtue of the provisions of its statutes which reads as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have *the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes,*

and ledges throughout their entire depth, the top or apex of which lies inside of surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical plains drawn downward as above described through the end lines of their locations, so continued in their own directions that such claims will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

(U. S. Rev. Statutes, sec. 2322.)

The possession of mining claim may be protected in the courts. If trespass be attempted it is the duty of the locator and not the Government to protect his possession.

(Sec'ty, Sept. 30, 1882, Louis Smith *et al.*, 9 C. L. O. 146.)

The statutes of Nevada (sec. 3023, General Statutes) provide as follows:

"There shall be in this State but one form of civil action for the enforcement or protection of privage rights, and the redress or prevention of private wrongs."

Section 3060 is as follows:

"The only pleadings on the part of the plaintiff shall be the complaint, or demurrer to the defendant's answer; and the only pleadings on the part of the defendant shall be the demurrer on the answer," etc.

Section 3087 is as follows:

"Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, for the purpose of the action, be taken as true.

"The allegation of new matter in the answer shall on the trial be deemed controverted by the adverse party."

The justification of defendant under the patent obtained subsequently to the commencement of the action was certainly new matter, and was controverted by the plaintiff, and thus the issuance and validity of the patent was put in issue, with the burden of establishing such controverted matter upon the defendant, but the plaintiff in error does not ask so much; he only asks to be allowed to show that the claim which he located as the "Free Coinage," was *publici juris*—belonging to the mineral domain of the United States, and open to location by any one who could put himself within the pale of the statute; and this is denied him by the supreme court of the State of Nevada upon the sole ground that a patent or the validity thereof cannot be inquired into in an action at law.

The decisions of this court are all the other way and are summed up in the case of Smelting Company *vs.* Kemp (104 U. S. S. C. 641), where it is said, on page 641: "Of course when we speak of the conclusive presumptions attending a patent for land, we assume that it was issued in a case where the Department had *jurisdiction* to act and execute it; that is to say, when the lands belong to the United States, and provision had been made by law for their sale. If they never were public property *or had previously been disposed of*, or if Congress had made no provision for their sale, or had reserved them, the Department would have no *jurisdiction* to transfer them, and its attempted conveyance of them would be *inoperative and void*,

no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having *jurisdiction* of a case it had assumed to decide.

"Matters of this kind, disclosing a *want of jurisdiction*, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal and goes to the existence of a subject upon which it was competent to act."

In the same case, on page 645: "So, also, according to the doctrines in the cases cited, if the patent be issued *without authority* it may be collaterally impeached in a court of law."

And also on page 646: "On the other hand, a patent may be collaterally impeached in any section and its operation as a conveyance defeated by showing that the Department had no *jurisdiction* to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, *or had been previously transferred to others.*

"In establishing any of these particulars, the judgment of the Department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its power to act at all is denied and shown never to have existed."

This case, therefore, fills the full measure of our contention; but reference may also be made to—

Stoddard *v.* Chambers, 2 How. 284.
Winter *et al. v.* Cromelin, 18 How. 87.
Easton *v.* Salisbury, 21 How. 426.
Best *v.* Polk, 18 Wall. 112.
Martin *v.* Nebraska, 21 Wall. 660.
Sherman *v.* Buick, 93 U. S. 209.
Rose *v.* Richmond Mining Co., 17 Nev. 25.

II.

When an application for a patent to mineral ground is made, and the same is regularly and legally protested against and an adverse claim filed, and suit regularly brought thereon, has the Department of the Interior any right or jurisdiction to allow the applicant to make entry and payment for the ground embraced in his said application, and is not such an attempted entry and payment void?

We think this question is fully answered by the statute itself, which is as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be staid until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. * * *"

(U. S. Rev. Statutes, sec. 2326.)

The receiver of the land office had no more right or *jurisdiction* to receive payment for the ground in dispute or any part of the claim applied for than any other person, hence his act as an official act is absolutely void.

In Richmond Mining Company *v.* Rose (114 U. S., at page 586) this Court says:

"But, while all this was in the hands of the court with full power to do what was necessary to establish judicially the rights of the parties, *the land office could not resume control of the case upon the idea which might there be entertained of an implied waiver of the claim from delay in the court.*

"*It had no power over the case, and its action and its patent, so far as it affects the rights of the plaintiff, are void.*"

In this case the pretended entry was void for the same reason, *i. e., want of jurisdiction.* The entry being void, it could not even under the ruling of the Department, which we shall notice hereafter, obviate the necessity of performing the necessary work upon the claim in order to prevent a forfeiture, and if it was not performed and plaintiff offered to prove, then the ground embraced in the "Free Coinage" mining claim was open to location, and the plaintiff in error, by his location, obtained a grant from the Government which was as good as a patent and as unassailable.

A grant may be made by law as well as by a patent pursuant to law.

Ryan *et al. v.* Carter *et al.*, 93 U. S. S. C. 82.
Noyes *v.* Mantle, 127 U. S. S. C. 348.

III.

If such an attempted entry is suspended by the Department, does it give any rights or immunities during such suspension?

We refer here to the letter and order of the Commissioner of the General Land Office which is made a part of the agreed facts in the case.

Record, pp. 11–12, folios 23–24.

It is evident to us that the entry in question should have been cancelled at that time. It was admitted to have been irregularly and improperly issued, when the land office had no jurisdiction to allow it; but the Commissioner evidently fell into the same error as the supreme court of the State Nevada of which we complain by assignment, *i. e.*, that no THIRD PARTY could possibly obtain an interest in the ground by location, although it has been

forfeited by both of the litigating parties; and instead of cancelling, further *suspended* such entry. It is evident, without argument or authority, that so long as the entry, if it was an entry, *was suspended* the applicant was not relieved from performing the necessary work or making the necessary annual expenditure. Suspension is defined by Webster as "to cause to cease for a time from operation or effect."

An opposite conclusion would open a wide door for fraud, both upon the Government, which desires the development of its mineral resources, and upon its citizens, who are entitled to locate mining claims.

This *suspension* of the entry was not removed until a long time after the commencement of this action.

Record, pp. 11–12, folios 23–24.

IV.

Must the annual work and expenditure required by the laws of the United States to prevent the forfeiture of a mining claim be done and made annually "until a patent has been issued therefor"?

This question, so far as we are advised, is *res integra* in this Court. It would seem that the statute itself answers the question fully. In section 2324 of the Revised Statutes of the United States we find this clause: "On each claim located after the 10th day of May, eighteen hundred and seventy-two, *and until a patent has been issued therefor*, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original loca-

tors, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

This language is plain and explicit, and leaves no room for construction; and yet the Department of the Interior, following an opinion of Secretary Schurz, have held that this language only means *until payment and entry.*

In Deun *v.* Reid (10 Peters, 526) this Court says: "This, it must be admitted when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where courts have construed a statute most liberally to effectuate the remedy; but when the language of the act is *explicit* there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature. When the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute; at its title, and the mischief intended to be remedied in conveying it into effect. But it is not for the court to say, when the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions. We are unable to say why the benefits of this statute were given to those who hold under deeds proved by the subscribing witnesses and withheld from those whose deeds were approved by the acknowledgment of the grantor. In most cases, if not in all, proof by acknowledgment would be deemed more satisfactory than by witnesses; but the legislature having made a distinction between the cases, whether it was intentional or not, reasonable or unreasonable, the *courts* are bound by the clearly-expressed language of the act."

An executive department of the Government cannot

change a statute so as to make it binding upon the courts. The language used was evidently used intentionally, for the object of the Government was to develop its mineral lands, and hence it made a certain amount of work obligatory upon any one who desired to hold the possession of mineral lands, at the same time pointing out the way by which he could obtain a title, but that there could be no mistake or delay it distinctly stated that he must perform his annual work upon his claim "until a patent had been issued therefor;" that is, until he had obtained a *complete* title to his claim.

The case of Diffeback *v.* Hawke (115 U. S. S. C. 405) has no bearing whatever upon this case. There the question of annual expenditure was not involved; it was simply a contest between a mineral and townsite claimant, and all that was said about a certificate of purchase being equivalent to a patent was *obiter dicta*. It is not decided in that case that the mineral claim could not become forfeited by a failure to perform the necessary annual work, so that it might be located by a mining claimant under the mining laws of the United States.

(See also Sedgwick on the Construction of Statutory and Constitutional Law, pp. 194–5. And cases cited, 2d Cranch, 399.)

V.

If, after an application for a patent to a mining claim, the applicant fails to perform the required work annually or make the required annual expenditure upon the claim and it is legally and properly located by another party after such failure, and before the resumption of work by said applicant or his heirs, assigns, or legal representatives upon or around such claim, is not a patent subse-

quently issued to such applicant void as to the right of possession of such locator?

We contend that this question should be answered in the affirmative from the authorities already cited and from the fact that the manner of disposition of mineral lands of the Government is radically different from that of any other of its lands.

A location properly made is a *grant* by the Government of an absolute and exclusive right to the possession of all the ground embraced within the limits of the claim located.

(U. S. Rev. Statutes, sec. 2322.)

A grant may be made by statute as well as by a patent authorized by statute.

(Ryan *et al. v.* Carter *et al.*, 93 U. S. S. C. 82.)

The patent attempted to be issued after such grant must necessarily be void from the fact that the Government has nothing to convey, and the patentee takes nothing by which he can molest the possession of such locator or justify any trespass upon his claim.

(See cases cited in point I of this argument.)

The doctrine of relation so much relied upon by defendant in error in the State courts can have no application here. The grant of the Government became vested in the locator, and no subsequent act of the Government could operate to divest it so long as the locator complies with the statute under which he took his grant.

(Noyes *v.* Mantle, 127 U. S. 348.)

It follows, if we are right in our premises, that the plaintiff in error should have been permitted to prove the facts which gave him the right to the possession of his

claim, and that the State courts erred in refusing to permit him to do so and rendering judgment against him, and that the judgment of the supreme court of the State of Nevada in this action should be reversed.

Respectfully submitted.

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Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 9 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

HENRY DENO, *Plaintiff in Error*,

v.

W. E. GRIFFIN, *Defendant in Error.*

No. 117.—OCTOBER TERM, 1892.

In Error to the Supreme Court of the State of Nevada.

BRIEF FOR DEFENDANT IN ERROR.

J. H. RALSTON,
Appellee's Attorney.

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IN THE

Supreme Court of the United States.

HENRY DENO, PLAINTIFF IN ERROR,

vs.

W. E. GRIFFIN, DEFENDANT IN ERROR.

No. 117.—October Term, 1892.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

By the agreed statement of facts entered into in this case the following facts appear (Record p. 10):

On October 4, 1877, A. Rickard located the Great Eastern Mine, situated in the Bristol Mining District, Lincoln County, Nevada, in conformity with the United States mining laws, W. E. Griffin succeeding to all his interest therein, and being now the holder and owner of the same.

On April 19, 1882, Griffin, defendant herein, applied to the United States for patent for said Great Eastern Mine and lode.

On June 23, 1882, in due time, Henry Deno, plaintiff herein, and the Bristol Silver Mining Company, protested against the issuance of such patent and filed an adverse claim in the Land Office, and on July 20, 1882, commenced an action to determine right of possession and title as between themselves and Griffin for a large portion of said Great Eastern Mine and lode. On April 4, 1887, this action was finally determined and dismissed by the Su preme Court of the State of Nevada.

On December 26, 1884, Griffin paid to the United States, through the Receiver at Eureka, Nevada, the price required by law for said mine, and received from said officer the usual official receipt therefor.

On February 6, 1886, Henry Deno, in due form of law, located the "Free Coinage" Mine, embracing within its boundaries the greater share of the Great Eastern Mine and its shaft and excavations made by Griffin and his predecessors in interest, the notice of location being placed within the limits of the Great Eastern.

On or about December 26, 1886, Griffin, without leave from Deno, entered upon the portion of the Free Coinage Mine embraced within the Great Eastern, and dug and blasted out some quantities of ore, rock and quartz, but did not remove the same beyond the boundaries of the Free Coinage Mine.

The present action was commenced March 1, 1887.

On September 7, 1887, Griffin received from the United States its patent for the Great Eastern and every part thereof, such patent being in due form.

On April 26, 1887, the Commissioner of the General Land Office informed the Register at Eureka that he had received a letter from Messrs. Britton & Gray asking, in view of certain facts, that the entry of the Great Eastern Mine theretofore made be cancelled and the case suspended till the conclusion of the then pending court proceedings,

which motion the Commissioner denied, but directed that the entry remain suspended pending the suit.

On July 18, 1887, the Clerk of the Supreme Court of the State of Nevada certified to the dismissal of the former action and that there were no pending proceedings by Deno and the Bristol Silver Mining Company against Griffin, which certificate was forwarded to the General Land Office more than two months before the issuance of the patent, and at that time the present action was the only one pending.

When the patent was issued, the only suit pending between plaintiff and defendant herein was the present one.

On the hearing the plaintiff was asked the following question by his attorneys:

Question. State whether or not there was any work or labor done or performed or any improvements or expenditures made upon, in or around the Great Eastern Mine or mining claim by the defendant or any one else during the year A. D. 1885.

Objected to by the attorneys for the defendant upon the ground that it was irrelevant, immaterial, and incompetent under the admitted facts in this case.

The objection was sustained by the court, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

The plaintiff, by his attorneys, then offered to prove that defendant Griffin did not perform or cause to be performed any work or labor upon the said Great Eastern Mine or mining claim or make or cause to be made any improvement thereon during the year A. D. 1885, and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year A. D. 1884, and that no work or labor was done or performed for or by him, said defendant, upon, in or around said mine or mining claim from December 26th,

1884, until December 28th, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

The attorneys for the defendant objected to the evidence so offered upon the ground that it was irrelevant, immaterial and incompetent under the admitted facts in this case.

The court sustained the objection, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

The attorneys for the defendant then admitted, for the purpose of the trial of this case, that from the 6th day of February, A. D. 1886, to and including the 28th day of December, A. D. 1886, the said plaintiff was in such constructive possession of the Free Coinage Mine and mining claim described in his complaint as he acquired by means or virtue of his location thereof.

No testimony other than as indicated being offered by either party, judgment was entered on October 19, 1887, in favor of the defendant, from which judgment an appeal to the Supreme Court of the State of Nevada was taken, the following assignment of error and grounds of appeal being relied upon by the appellant:

I.

The court below erred in sustaining the objection of defendant to the question propounded to plaintiff while on the witness stand testifying in his own behalf as to the work, labor and improvements done, performed or made upon the Great Eastern mining claim, under claim of title to which defendant attempts to justify the trespass alleged in plaintiff's complaint, during the year A. D. 1885, by said defendant or any one else.

II.

The court below erred in not permitting the plaintiff to prove, when he offered so to do, that defendant, Griffin, did not perform, or cause to be performed, any work or labor

upon the said Great Eastern Mine or mining claim, or make, or cause to be made, any improvements thereon during the year A. D. 1885, and that not sufficient work or expenditure was done or made by him, said defendant, on said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year 1884, and that no work or labor was done or performed for or by him, said defendant, upon or around said mine or mining claim from December 26, A. D. 1884, until December 28, A. D. 1886, which latter is the act constituting the trespass complained of by plaintiff.

III.

The court below erred in rendering, making and entering the judgment from which this appeal is taken.

The Supreme Court of the State of Nevada, after hearing, on February 8, 1889, affirmed the judgment below, from which judgment the present appeal is taken, the following being plaintiff's assignment of errors:

I.

The Supreme Court of the State of Nevada erred in not sustaining the assignment of errors made by the appellant in said court, *i. e.*:

First. The court below erred in sustaining the objection of the defendant to the questions propounded to plaintiff, while on the witness stand, testifying in his own behalf, as to the work, labor, and improvements done, performed or made upon the Great Eastern mining claim under claim of title, to which defendant attempts to justify the trespass alleged in plaintiff's complaint during the year A. D. 1885 by said defendant or any one else.

Second. The court below erred in not permitting the plaintiff to prove, when he offered so to do, that defend-

ant Griffin did not perform, or cause to be performed, any work or labor upon the said Great Eastern Mine or mining claim, or made, or caused to be made, any improvements thereon during the year A. D. 1885; and that not sufficient work or expenditure was done or made by him, said defendant, in said mine or mining claim to prevent a forfeiture thereof under the laws of the United States during the year A. D. 1884; and that no work or labor was done or performed for or by him, said defendant, upon or around said mine or mining claim from December 26th, A. D. 1884, until December 28th, A. D. 1886, which latter was the act constituting the trespass complained of by plaintiff.

Third. The court below erred in making, rendering and entering the judgment from which this appeal is taken.

II.

That said Supreme Court of said State of Nevada erred in assuming and basing its decision and judgment in this case upon such assumption, that there was no difference in law between the rights of a locator under a location existing at the time of application for patent or made prior to the expiration of the time allowed for protesting and adversing such application, and one made long subsequent to that time upon a failure by the contesting parties or either of them to perform the necessary work or make the necessary expenditure upon their respective claims to protect their rights to their respective possessions thereof.

III.

That said Supreme Court of said State of Nevada erred in assuming as a matter of law that the land office or department had jurisdiction to receive the money for the Great Eastern mining claim from the defendant in error, or any jurisdiction except as the statute provides, after the commencement of the suit in which "Henry Deno and the Bristol Silver Mining Company" were plaintiffs and "Henry

Deno" (W. E. Griffin) was defendant, and in not deciding that the pretended entry by defendant was absolutely void.

IV.

That said Supreme Court of the State of Nevada erred in not deciding that the patent put in evidence by the defendant in error was absolutely void.

V.

That said Supreme Court of the State of Nevada erred in not deciding that the location of the plaintiff in error gave him a grant from the Government of a right to the possession of the Free Coinage mining claim so long as he performed the necessary annual work thereon.

VI.

That said Supreme Court of Nevada erred in assuming that "Henry Deno and the Bristol Silver Mining Company" was the same legal entity as "Henry Deno."

Argument.

The first question which confronts us is, had the Land Office jurisdiction to issue the patent relied upon by defendant Griffin?

We submit that jurisdiction over the subject matter is given by Chapter Six, entitled "Mineral Lands and Mining Resources," Title 32, Rev. Stat. U. S. Jurisdiction over the claimant and all other persons interested was acquired by notice and publication as prescribed by Secs. 2325 and 2326 of that chapter.

But it is insisted that, granting jurisdiction over the subject matter and person, yet the Land Office, by permitting an entry while litigation respecting the Great Eastern claim was then pending, in effect passed a decree in excess of jurisdiction and therefore void.

The statutory provision is that when an adverse claim is filed in proper time all pending proceedings shall be "stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." Sec. 2326 R. S. U. S. It is not prescribed that if, nevertheless, the Land Office does act, its action shall be void.

The supposed excess of jurisdiction relates not to the nature of the act, but to the time when performed. The permitting of an entry was an act authorized by law. Appellant's contention must be that the act was improvidently performed.

We have, therefore, a case where the Land Office had jurisdiction over the subject matter, over the parties, and power to do the particular act. If the act was done when the law directed that nothing should be done, but did not make void an act performed prematurely, then we have merely a case of error in the exercise of a jurisdiction expressly conferred by statute. Such errors can never be made the subject of collateral attack as in the present case, but only met in direct proceedings.

The extent to which the decision of the Land Office may be attacked is defined and thoroughly explained in St. Louis Smelting Co. *vs.* Kemp, 104 U. S., 636, wherein it is said:

> "So also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification that when the authority depends upon the existence of particular facts or upon the performance of certain antecedent acts, *and it is the duty of the Land Department to ascertain whether the facts exist or the acts have been performed*, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision."

But it is said that by authority of Richmond Mining Co. *vs.* Rose, 114 U. S., 576, whenever a case involving the right of possession of a mining claim is pending in the courts, the Land Office has no power over the case, and its action and its patent, so far as it affects the rights of the plaintiff, are void.

This remark has no application to the pending case. We are not invoking a patent prematurely issued in a case brought to determine whether a patent shall ultimately issue to one party or the other of the record.

Defendant Griffin is relying upon a patent, the issuance of which, however informal, was justified by the decision of the Supreme Court of the State of Nevada, in the former action. We will readily concede that when the original suit of Deno *vs.* Griffin was pending, the Land Office could not, by its action, prejudice either party to the record.

This is not a case where the appellants seek to show that the law did not provide for the sale of these lands, or that they had been reserved from sale, or dedicated to special purposes, or previously transferred to others.

See St. Louis, &c., Smelting Co. *vs.* Kemp, *ante.*

The department's authority to act at all is not denied. The correctness of its adjudication upon a matter of evidence necessary to be proved before the issuance of a patent, is the only thing sought to be attacked.

II.

But it is contended that the patent cannot date from its entry on December 26, 1884, and that no assessment work having been performed from that date till December 26, 1886, the action of the Land Office in issuing patent on September 7, 1887, was illegal, because not predicated upon such a state of facts as to labor performed on the ground as would justify it.

Our answer to this is threefold :

The statutory provision is that when an adverse claim is filed in proper time all pending proceedings shall be "stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." Sec. 2326 R. S. U. S. It is not prescribed that if, nevertheless, the Land Office does act, its action shall be void.

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Our answer to this is threefold :

1. The Land Office had jurisdiction to determine whether such a state of facts existed as would justify the issuance of a patent. If the Office was satisfied that the labor had been performed, and, so adjudicating, issued its patent, its decision was conclusive, except, at least, in a direct action to set aside the patent.

It cannot be that a patentee is to hold himself in readiness at all times to prove facts which have already been judicially determined in a tribunal established for that purpose.

The issuance of a patent has always been held to be a determination of the existence of the facts necessary to justify its issuance, and the correctness of such determination cannot be impeached in a collateral proceeding.

In French *vs.* Fyan, 93 U. S., 169, it was held that the Secretary having certified certain lands to be swamp lands, his conclusion could not be contradicted by oral evidence.

So in Dahl *vs.* Raunheim, 132 U. S., 260, it was decided that defendant having failed to show before the Land Office that plaintiff had not complied with requirements of law, could not afterwards be heard to call in question location or character of ground.

So in United States *vs.* Budd, 144 U. S., 154, we find that no appeal lies from the determination of the land officers to the courts on question of facts in the absence of fraud.

But aside from this—

2. The patent, as to its effectiveness, relates back to the date of entry, and neither law or reason dictates the performance of assessment work after that date.

All delay after entry may fairly, as a rule, be charged against the United States. The reception of the money for the patent only takes place after the determination of the right to receive a patent. That point being adjudicated, the right of the patentee is complete—the interest of the government in the land terminates. Why, then, should

assessment work be required? All the government has to do is the mechanical labor of preparing a patent.

The decision of the Supreme Court of Nevada rendered valid an act of the Department which at most was voidable, not void. It determined that Griffin was the person entitled to the patent. It settled that in him and not in Deno was all interest in the land vested. His interest in the land was adjudged perfect from the inception of the proceedings

These views are borne out by numerous authoritative decisions.

In Richmond Mining Co. *vs.* Rose, 114 U. S., 576, it is said :

> "The thing to be decided was the right to the conflicting claims to this lode. This was within the jurisdiction of the court, and any patent issued to one or the other, or both these parties, under this proceeding, for this property, must relate back to the date of their claims, and override the new patent. This result cannot be defeated by producing this new patent to destroy it. The claim was initiated by a party to this suit *pendente lite*, and must abide the result of the litigation in this case."

So in Deffeback *vs.* Hawke, 115 U. S., 392, it is stated that when " patent was subsequently issued, it related back to the inception of the right of the patentee."

So in Heydenfeldt *vs.* The Daney G. & S. Mining Co., 93 U. S., 634, a contest as to whether certain land was under the control of the United States as mining ground or passed to the State of Nevada by congressional legislation as school land, it is declared that the mining patent " obtained from the government relates back to the time of the original location and entry, and perfects their title."

So in St. Louis Smelting Co. *vs.* Kemp, 104 U. S., 636, it is said :

"This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee often recognized, by this court to show the date of the original proceeding for the acquisition of the title where it is not deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims."

3. While never decided by this court, State courts have decided, and the Land Office, by its settled practice, has determined that assessment work is unnecessary after entry.

Aurora Hill, &c., *vs.* Tangerman, 12 Sawyer, 355.

Alta M. & S. Co. *vs.* Benson M. & B. Co., 16 Pac. Rep., 565.

Sickel's Mining Laws and Decisions, 1881, pp. 384–392 and 377–383.

Uniform construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons.

Brown *vs.* United States, 113 U. S., 568.

These considerations and cases, we submit, especially Richmond Mining Co. *vs.* Rose, effectually dispose also of the contention that a party to a cause may, while it is pending, commence independent proceedings to obtain a patent and thereby obtain an advantage over his opponent—the course sought to be taken by Deno in this case.

We therefore submit that the decision of the Supreme Court of the State of Nevada must be affirmed.

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